89-1567

No.

In The
Supreme Court of the United States
October Term, 1989

VINCENT ASPROMONTI,

Petitioner,

—vs—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION

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QUESTIONS PRESENTED

1. Did the passage of 31 U.S.C. §5324 create a new crime?

2. Was Aspromonti's conviction, which was based on acts committed in 1982, a conviction for a non-crime as these acts were not criminalized until 1987?

3. Are 31 U.S.C. §§5313 and 5322(b) unconstitutionally vague statutes providing insufficient notice to Aspromonti, thereby depriving him of due process?

4. Were Aspromonti's trial counsel and appellate counsel ineffective as they failed to meet the standards for effectiveness set forth in Strickland v. Washington, 466 U.S. 668 (1984)?

The petitioner, Vincent Aspromonti, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit in this proceeding dated December 18, 1989.

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The Order of the Court of Appeals, not to be reported, appears in the Appendix hereto in slip opinion form. The Memorandum and Order of the District Court for the Southern District of New York, together with its Judgment, are also reproduced in the Appendix.

JURISDICTION

The Order of the Court of Appeals for the Second Circuit was decided on December 18, 1990. This petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Art. I, §9, cl. 3

United States Code:

Title 18, §2

Title 18, §2(a)

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Title 18, §371

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31 C.F.R. 103.22

31 C.F.R. 103.22(a)

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31 C.F.R. 103.26

Federal Rules of Evidence:

Rule 404(b)

Rule 801(d)(2)(E)

Statement of the Case

Petitioner Vincent Aspromonti ("Aspromonti") and co-defendant George Ruggiero ("Ruggiero") were indicted on or about July 2, 1987. Count I charged Aspromonti with conspiring to defraud the Treasury Department and the IRS by obstructing and hindering efforts to gather information and reports of currency transactions in excess of $10,000.00, and to commit certain offenses, to wit: (a) wilfully fail to file and cause a bank to fail to file Currency Transaction Reports ("CTRs") in violation of 31 U.S.C. §5313 and 5322(a) and (b) [formerly 31 U.S.C. §§ 1081, 1058 and 1059(2)] and 31

C.F.R. 103.22(a) and 103.25[1] (b) knowingly and wilfully falsify, conceal and cover-up and cause to be falsified, concealed and covered up by a trick, scheme and device a material fact in violation of 18 U.S.C. §§ 1001 and 2; and (c) knowingly and wilfully make and use and cause to be made and used a false writing and document knowing the same to contain a materially false, fictitious and fraudulent statement and entry in violation of 18 U.S.C. §§1001 and 2.

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1 Effective 1985, 31 C.F.R. 103.25 was redesignated as 103.26.

The substantive Counts of the Indictment charge Aspromonti with failing to file and causing the failure to file CTRs with the IRS for cash totaling approximately $11,455,536.00 deposited in three (3) Extebank[2] into three (3) checking accounts, namely: Galion Holdings, Inc. Regular Account (Count II); Galion Holdings, Inc. Special Account (Count III); and Down to Earth Management Corp. Account (Count IV), as part of the pattern of illegal activity involving currency transactions exceeding

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2 On October 2, 1987, Extebank plead guilty to failing to file CTRs in violation of 18 U.S.C. §5322(a), a misdemeanor, and fined $100,000.00.

$100,000.00 within a twelve (12) month period in violation of 31 U.S.C. §§5313 and 5322(b) and 18 U.S.C. §2.

At trial, the government attempted to prove a conspiracy to violate the CTR requirements of §§5313 and 5322(b) which involved deposits to bank accounts of two (2) business entities, i.e., Galion Holdings, Inc. ("Galion") and Down to Earth Management Corp. ("DEM"), opened at Extebank. The government's case against Aspromonti principally consisted of the testimony of Lawrence Iorizzo ("Iorizzo"), an alleged co-conspirator, government informant and participant in the Witness Protection Program.

The government's questioning of Iorizzo began with "background" information -- an extensive and highly colorful tour of the illegal gasoline business and organized crime's involvement in this industry -- which included his establishment of Galion for the purposes of purchasing and selling boot-legged gasoline and his establishment of DEM as the operating entity for various Long Island parkway gasoline stations that became part of the bootleg operation; the power and authority to make decisions for Galion was at all times vested with Iorizzo and Michael Franzese ("Franzese") although John Garbarino was the president and Jimmy Mayes was to be vice president; and that

Galion's accounts, already transferred once, were transferred to Extebank in the spring of 1982.

Iorizzo also testified that he was first introduced to Aspromonti by Franzese as his bodyguard in the fall of 1981, shortly after Galion commenced operations. Iorizzo claimed that he hired Aspromonti as a salaried employee of Galion at Franzese's request, and that Aspromonti's duties included making bank deposits and issuing checks, as well as being responsible for receiving the payments from various dealers who purchased gasoline from Galion, recording the cash and checks received and preparing the necessary bank deposits. In ad-

dition, Aspromonti kept track of and made all regular office disbursements, apart from Galion's purchase of gasoline. Iorizzo also stated that Aspromonti was in charge of collecting the deposits and physically delivering them to the banks. Apparently Aspromonti's role in Galion operations was not "decision-maker," but "clerk-like".

At Aspromonti's trial, the government contended that Aspromonti, Ruggiero, Iorizzo, Franzese and others (both named and unnamed) conspired to prevent Extebank from filing CTRs with respect to the Galion regular account, the Galion special account and the DEM account. According to Iorizzo,

the primary concern with all of Galion's bank accounts was "making sure that cash transaction reports weren't filed."

Extebank formally exempted the Galion regular account from CTR requirements pursuant to 31 C.F.R. §103.22(b), but the Galion special account and the DEM account were never formally exempted.

The government introduced into evidence various Extebank records indicating that (a) for the period April 12, 1982 through September 29, 1982, the total sum of $10,060,514.18 was deposited into the Galion regular account of which $7,604,756.15 was cash; (b) for the period May 21, 1982 through October 1, 1982, the

total sum of $4,100,415.95 was deposited into the Galion special account, of which $3,481,888.02 was cash; and (c) for the period May 25, 1982, through November 12, 1982 the total sum of $374,251.19 was deposited into the DEM account, of which $358,892.84 was cash.[3] Extebank failed to file any CTRs reflecting these cash deposits.

The nexus for the government's contention at trial that Aspromonti was an

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3 Much of the information regarding the accounts and deposits was improperly admitted into evidence as a result of the failure of Aspromonti's trial counsel to raise the statute of limitations issue.

integral part of a conspiracy to prevent Extebank from filing CTRs for Galion and DEM proved extremely attenuated and limited. All of the evidence attempting to link Aspromonti to the conspiracy came solely from Iorizzo's mouth.

Iorizzo said Aspromonti (and others) were present at a meeting in which Iorrizzo was introduced to "Rocco" of Citibank's Syosset branch, who would do "whatever was neccessary" for a Galion account which was to be open.[4]

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4 Iorizzo incorrectly assumed that no CTRs were filed by Citibank.

Three (3) or four (4) months after Galion transferred its accounts to Rocco at Citibank, Iorizzo testified that Aspromonti told him that Rocco was "getting nervous" these accounts would probably need to be changed. Shortly thereafter, Iorizzo stated that he met with Franzese, Aspromonti and others and that Aspromonti suggested the possibility of transferring the accounts to his cousin's bank. Iorizzo went on stating that, "Vinnie assured me that his cousin would take care of any cash problems as far as CTR's or any reports, 1099's, anything like that, and also if there were any kind of problems with inves-

tigations, we would know about it. He would cover us."

Iorizzo claimed that Aspromonti next told him that, "his cousin would have to be taken care of and we would have to give him something. . . . I think, we discussed a figure of four hundred dollars a week in cash."

Iorizzo testified that at a housewarming party[5] for Aspromonti, he was intro-

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5 Iorizzo's credibility is suspect as he retreated from his original testimony that the housewarming party was in June, 1982 on cross-examination ("I don't recall specifically"), eventually conceding that the housewarming party actually took place a month or two after the closing, placing it as late as September, 1982. Moreover, at the time of his testimony, Iorizzo was suing Aspromonti over monies due from Aspromonti as a re-

duced to Aspromonti's cousin, Ruggiero, and told by Aspromonti that, "[h]e was the manager at the Extebank where we are doing business and he was doing everything Rocco was doing at Citibank, covering our situation as far as CTR's, cash transactions, things like that." Finally, Iorizzo testified that sometime in 1983, after the actual close of the conspiracy charged in the indictment, he again met with Rug-

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sult of the sale of Iorizzo's house, giving a private motive to inculpate him.

6 The active phase of the alleged conspiracy ended in November, 1982, when the final DEM account at Extebank was closed.

giero and Aspromonti, at which time, Iorizzo insisted, "Mr. Aspromonti and myself both questioned Mr. Ruggiero to be sure that the CTR's were in order. . . ." This was three or four months after the close of the Galion and DEM accounts.

Iorizzo's testimony was given largely in the form of a loose narrative, except when statements of Aspromonti were called for, in which case Iorizzo claimed to recall exact words and phrases.

The balance of Iorizzo's testimony was loaded with prejudicial statements regarding Aspromonti and Galion, statements which did nothing to prove the conspiracy charged

in the indictment.[7] This highly improper and prejudicial testimony included: (i) attempts to link Aspromonti and the Galion operation to organized crime; (ii) statements by Iorizzo regarding his involvement in organized crime and organized crime in general; (iii) testimony regarding alleged conspiracies which were not charged in the indictment and which were irrelevant to the conspiracy charged; (iv) testimony regarding numerous uncharged crimes purportedly involving Aspromonti and others.

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7 Aspromonti's trial counsel inexplicably failed to object to much of this highly improper and prejudicial testimony.

The testimony of the other government witnesses at trial (one (1) a civilian employee of Extebank, the others IRS agents or police personnel) offered no additional evidence of any moment as to Aspromonti.[8]

The defense called two witnesses, both senior officers at Extebank, one of whom testified that he had never heard of Aspromonti until the Galion accounts were ready to be closed and had not even heard of DEM until the investigation started.

Although there was testimony on the

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8 Though the government contends that the documentation is the strongest evidence in this case, there is not one piece of documentation that links Aspromonti to the conspiracy.

issue of whether Galion and/or DEM were retail corporations and thus possibly entitled to be exempt from the CTR filing requirements, the trial Court simply charged that Extebank had a general duty to file CTRs, omitting any reference to the "retailer-exemption".

The charge to the jury also included the "fact" that Extebank had plead guilty to the crime that Aspromonti was charged with aiding and abetting, but did not

explain what crime Extebank had plead guilty to.[9]

After Aspromonti's sentencing and the affirmance of his conviction by the Second Circuit, Aspromonti filed a motion pursuant to 28 U.S.C. §2255 based on four (4) grounds: (i) that his actions were not violative of any statute at the time he acted; (ii) that his conviction was based

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9 Aspromonti was indicted for aiding and abetting violations of 31 U.S.C. §§5313 and 5322(b) by Extebank. However, Extebank was indicted and plead guilty to violations of 31 U.S.C. §5322(a), a misdemeanor, not §5322(b), a felony. See, note 2, supra. Aspromonti was, therefore, illegally convicted and sentenced for a more serious crime [§5322(b)] than that which he is alleged to have aided and abetted [§5322(a)].

on unconstitutionally vague statutes which failed to give him sufficient notice that his acts were prohibited; (iii) that he was the victim of both ineffective assistance of trial counsel as well as ineffective assistance of appellate counsel; and (iv) that the charge to the jury was a constitutional violation of his due process rights.

On June 2, 1989, the District Court denied the motion, finding "no merit in any of [Aspromonti's] arguments." (Emphasis added.) [A-5-8]

The District Court's reasoning, as set forth, was that the Second Circuit had previously disposed of Aspromonti's statutory

arguments;[10] and the "sincere and appealing impression before the jury" made by Aspromonti's trial counsel made him competent [A-6-7], just as the "forceful, articulate and coherent" briefs submitted by Aspromonti's appellate counsel deemed them competent. [A-8]

On appeal, the Court of Appeals affirmed the District Court's denial of Aspromonti's motion, rejecting his challenge to his

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10 "The Court of Appeals for the Second Circuit has already rejected the first two contentions in the opinions in this case and in United States v. Nersesian, 824 F.2d 1294 (2d Cir.), cert. denied, 108 S. Ct. 35[7] (1987), and United States v. Heyman, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986)." [A-6-7]

conviction premised upon the fact that Congress did not intend for 31 U.S.C. §§5313 and 5322 to prohibit his conduct, as evidenced by the enactment of §5324, and holding his other contentions meritless. [A-1-4]

REASONS FOR GRANTING THE WRIT

Aspromonti's conviction was based on acts which were not recognized crimes at the time they were committed

The acts for which Aspromonti (an individual) was prosecuted occurred in 1982, but were not proscribed by the applicable law then in effect, see, 31 U.S.C. §5313 (duty to file CTR is that of financial institution, not depositor), and instead

fall squarely within those proscribed only by 31 U.S.C. §5324, enacted four (4) years after Aspromonti's actions took place.[11]

31 U.S.C. §§5313 and 5322(b) were enacted only to cover the conduct of financial institutions. See, 31 C.F.R. §103.22(a). Congress did not directly prohibit the very conduct for which Aspromonti was indicted and convicted until it enacted 31 U.S.C. §5324 in 1986. The enactment of this new statute is strong evidence that Congress did not regard the newly proscribed conduct as prohibited by any prior existing law.

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11 The Government conceded that Congress did not explicitly make the acts complained of a crime until 1987.

Congress specifically acknowledged that it was closing a gap in the then-existing statutory and regulatory framework, which did not criminalize structuring a currency transaction in order to evade the reporting requirements of the Bank Secrecy Act. Congress specifically set forth that the statute "expressly subject[s] to potential liability a person who causes or attempts to cause a financial institution to fail to file a required re-port that contains material omissions or misstatements of facts." See, H.R. Rep. No. 746, 99th Cong., 2d Sess. 19 (1986) ("H.R. Rep. No. 746). See, also, Id. at 18.

The legislative history of 31 U.S.C. §5324 clearly reflects Congress' intention that §5323 permit for the first time, the prosecution and conviction of persons other than financial institutions, which up to that point in time were the only entities clearly prosecutable under 31 U.S.C. §5313. See, H.R. Rep. No. 746; Murphy, Maureen M., Money Laundering: Legal Analysis (April 7, 1986)(available from the Library of Congress, Congressional Research Service).

One of the reasons for the amendment of 31 U.S.C. §5311, et seq. was specifically to subject persons to criminal liability for structuring a currency transaction in order to evade the reporting requirements

of the Bank Secrecy Act of which 31 U.S.C. §§5313 and 5322(b) are a part. See, H.R. Rep. No. 746 at 19.

Furthermore, Congress made clear its intention that §5324 resolve the dispute among the Circuit Courts of Appeal as to the applicability of 31 U.S.C. §§5313 and 5322(b) to individuals, i.e., customers such as Aspromonti:[12] the House Report

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12 Compare, e.g., United States v. Larson, 796 F.2d 244 (8th Cir. 1986); United States v. Varbel, 780 F.2d 758 (9th Cir. 1986), United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985) [convictions under 18 U.S.C. §§2(b) and 1001 and 31 U.S.C. §5311, et seq. were reversed], with United States v. Richeson, 825 F.2d 17 (4th Cir. 1987); United States v. Heyman, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); United States v. Cook, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220

specifically addresses the split as to whether individuals could be prosecuted for causing a financial institution to fail to file CTRs see, H.R. Rep. No. 746 at 18-19]; and the Banking Committee stated that Section Two of H.R. 5176, from which 31 U.S.C. §5324 is derived, "would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a fin-

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(1985) [convictions upheld]. And, see, cases collected in United States v. Nersesian, 824 F.2d 1294, 1310-1311 (2d Cir.), cert. denied, 484 U.S. 958 (1987).

ancial institution to file a required report that contains material ommissions or misstatements of fact." See, H.R. Rep. No 746 at 19.

The summary of the Comprehensive Money Laundering Prevention Act as amended and as adopted by the House Banking Committee describes Section 2 of the Act as adding 31 U.S.C. §5324 "to expressly subject to potential criminal and civil liability a person . . . " See, H.R. 5176, 99th Cong., 2d Sess. (1986).

Based on the substantial legislative history concerning 31 U.S.C. §5324, it is plain that prior to its enactment, no statute clearly imposed criminal liability on a

bank customer for causing a financial institution to fail to file CTRs.

The Second Circuit sidestepped the issue below when it held that its holdings in United States v. Nersesian, 824 F.2d 1294 (2d Cir.), cert. denied, 484 U.S. 958 (1987) and United States v. Heyman, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986), applied to the instant action[13] as Congress "voiced no opinion as

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13 Aspromonti is factually distinguishable as the customer did not structure the transactions in any particular manner. See, Nersesian, 824 F.2d at 1309, and Heyman, 794 F.2d at 789-90. But, cf., United States v. Perlmutter, 636 F. Supp. 219 (S.D.N.Y. 1986) (court dismissed indictment against bank customer charged with violations of §5311, et seq., 18 U.S.C. §§2 and 1001). Moreover, neither Nersesian nor Heyman analyzed Aspro-

to the correctness" of its rule of finding an individual criminally liable through 18 U.S.C. §2(b) and that the Court did not "think that any such inference can be drawn from the fact that Congress found it necessary to clarify the Bank Secrecy Act through the enactment of §5324." [A-3]

The Second Circuit is incorrect in assuming that Congress did not reject the pre-§5324 Second Circuit approach since it did not do so explicitly. Indeed, it would not have been necessary to enact the new statute <u>if</u> then-existing law proscribed the conduct newly crininalized by §5324. Con-

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monti's argument in light of 31 U.S.C. §5324.

gress is never presumed to have enacted a useless or duplicative statute. See, United States v. Blasius, 397 F.2d 203 , 207 (2d Cir.), cert. dismissed, 393 U.S. 1008 (1968).

In short, Aspromonti has been convicted of conduct which was not criminalized by Congress prior to the enactment of §5324, effective four and one-half years after he acted. In fact, even if Aspromonti's conduct was not criminalized until Heyman, that was not until 1986, still some three years after Aspromonti acted. Clearly, his conviction implicitly violated the prohibition against ex post facto law enforcement, see, U.S. Const., Art. I, §9, cl. 3 ["No .

. . ex post fact law shall be passed."], and should have been vacated, and the indictment dismissed. See, Weaver v. Graham, 450 U.S. 24 (1981).

Aspromonti was denied due process

The denial of Aspromonti's motion on due process grounds conflicts with this Court's standards. Aspromonti's prosecution and conviction under 21 U.S.C. §§5313 and 5322(b), albeit through 18 U.S.C. §§2 and 1001, violated the Due Process Clause of the Fifth Amendment as these statutes are unconstitutionally vague and lack sufficient notice that their provisions proscribed Aspromonti's acts. The Constitu-

tion mandates that "before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be prohibited with sufficient specificity to forewarn of the proscription of said conduct." See, United States v. Anzalone, 766 F.2d 676, 678 (1st Cir. 1985).

Aspromonti did not receive the benefit of a lenient interpretation of the ambiguity obviously present in the statute. See, United States v. Enmons, 410 U.S. 396, 411 (1973). Instead, he was unconstitutionally convicted even after Congress resolved the obvious ambiguity in the statutory framework in his favor by determining that a new, separ-

ate statute was required to hold individuals liable for causing the failure of a financial institution to file CTRs, i.e, 31 U.S.C. §5324, enacted October 27, 1986.

This Court has established the two (2) factors which a court must weigh in considering challenges to a statute on these grounds: (i) whether the law in question is sufficiently definite to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and (ii) whether the law provides sufficiently explicit standards to prevent arbitrary and discriminatory enforcement by those charged with the duty of applying the law. Grayned v.

City of Rockford, 408 U.S. 104, 108-09 (1972).

This Court has further established that "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Indeed, "a law must give fair notice and warning of the scope of its prohibitions or commands and must contain reasonably clear guidelines for law enforcement officials and triers of fact to follow." Smith v. Goguen, 415 U.S. 566, 572-73 (1974).

The imposition of criminal sanctions on Aspromonti's activity violates the fair

warning requirement of the due process clause of the Fifth Amendment. "[A] conviction under 18 U.S.C. §1001 violates the due process clause because the [Currency Transaction] Reporting Act imposes no duty to disclose the . . . transactions to the bank, and thus a person has no fair warning that his conduct is illegal." United States v. Larson, 796 F.2d 244, 246 (8th Cir. 1986). See, also, United States v. Varbel, 780 F.2d 758, 760-63 (9th Cir. 1986); United States v. Anzalone, 766 F.2d 676, 682-83 (1st Cir.

1985); United States v. Perlmutter, 636 F. Supp. 219, 224-25 (S.D.N.Y. 1986).[14]

Moreover, although pursuant to 31 U.S.C. §5313(a) the Secretary of the Treasury could have required that a bank customer have the responsibility to file a CTR, the regulation does not require a bank

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14 "[T]he government is clearly correct in concluding that Perlmutter intended to avoid reporting requirements. . . . However, intent does not mean that Perlmutter had notice that the explicit $10,000.00 line drawn by the government would be blurred by an intent analysis. While it is unfortunate that what some would label improper avoidance behavior cannot be punished in this instance, the due process clause requires that a criminal offense must be explicit, and not merely inferrable from the relevant statute." [Emphasis added.]

customer do so. Thus, the Secretary of the Treasury implicitly exempted bank customers from that duty.[15] See, United States v.

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15 In United States v. Mastronardo, 849 F.2d 799, 804-05 (3d Cir. 1988), the court found that 31 U.S.C. §§5311 et seq. and 31 C.F.R. §103.22 "did not give a reasonable bank customer fair notice that 'structuring' cash transactions to avoid the reporting requirement is criminal. Therefore, we need not reach an analysis of Congressional intent. Although the statute authorizes the Secretary to draft regulations requiring 'participants' in transactions to file CTRs, the Secretary did not do so. Rather, the Secretary enacted regulations which, by their explicit language, place a duty to file CTRs only on financial institutions. The regulations do not even intimate that a bank customer might somehow be violating the law if he structures his transactions so as to avoid making a transaction in currency greater than $10,000. While a bank customer might reasonably conclude that doing so would frustrate the intent of Congress, frustrating the intent of

Perlmutter, 634 F. Supp. 219, 224, citing United States v. Anzalone, 766 F.2d 676, 683. ("As no [legal duty to disclose] existed on behalf of appellant to report to the Secretary either directly or through the financial institution, there can be no [conspiracy] to conceal in violation of 18 U.S.C. §1001.")

Clearly, as there was no statute or regulation which made Aspromonti's conduct plainly illegal when he acted in 1982, and

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Congress is not criminal. An additional factor, noted by the Ninth Circuit, is that '[t]he present ambiguity regarding coverage of the Reporting Act and its regulations had indeed been created by the government itself.'" (Emphasis added.)

the case law which was relied upon in denying Aspromonti's motion, i.e., Heyman and Nersesian, supra, was not decided until 1986 and 1987, respectively, Aspromonti cannot possibly be said to have had any fair notice at the time he committed the allegedly proscribed acts that he could be indicted and prosecuted under 31 U.S.C. §§5313 and 5322(b) for them (either directly or through the application of 18 U.S.C. §§2, 371 or 1001), and the lower court's findings that he did conflict with the applicable law.

Neither the actions of Aspromonti's trial counsel nor his appellate counsel passed the test of effectiveness as set forth in Strickland v. Washington

An analysis of the record clearly demonstrates that Aspromonti was victimized by the ineffective assistance of both his trial and appellate counsel. In denying Aspromonti's motion, both lower courts completely disregarded the applicable rule as set forth in Strickland v. Washington, 466 U.S. 668 (1984).

The errors of trial counsel began prior to trial [failure to assert the statute of limitations as a bar to prosecution], continued throughout the trial [failure to object to improper testimony and opening the

door on cross-examination to prejudicial testimony being elicited on re-direct, an er-ror which the government itself pointed out in the criminal appeal], and lasted until this Court charged the jury [failure to request charge that if Galion and DEM were found to be "retail" operators, they could be exempted from the CTR requirements pursuant to 31 C.F.R. §103.22(b)(2)(i)].

Unquestionably, all of these errors demonstrate that Aspromonti's trial was a mockery of justice and that his representation was so inadequate as to shock one's conscience, see, Brockington v. Quick, 486 F. Supp. 901 (S.D.N.Y. 1981), so that his motion should have been granted.

In Strickland v. Washington, 466 U.S. 668, 687-88, 693-94 (1984), this Court established a two-pronged test by which to judge a claim of ineffective assistance of counsel: "to prevail on such a claim a defendant must show both that his attorney's conduct fell below an objective standard of reasonableness under prevailing professional norms, and prejudice such that but for counsel's unprofessional conduct the result would have been different." Id.

Both the district court and the circuit court failed to apply this test. Judge Nickerson's "test"-- his impression of trial counsel's impact on the jury-- has no bearing on trial counsel's effectiveness.

Indeed, Judge Nickerson gives the impression that failure to make objections has nothing to do with a competency determination.[16] The circuit court approved Judge Nickerson's test by simply declaring Aspromonti's argument to be without merit. [A-3]

Trial counsel failed to alert the trial court at any time that many of the acts upon which Aspromonti was charged with aiding, abetting or causing occurred prior

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16 "This court did not deem petitioner's trial counsel, John L. Buonora, incompetent. Indeed, he made a sincere and appealing impression before the jury. Petitioner now claims his counsel was ineffective because he failed to make various objections." [A-7]

to July 14, 1982, or more than five (5) years prior to his indictment, which is the applicable statute of limitations. See, 18 U.S.C. §3282. This despite the fact that approximately sixty (60%) percent of the 483 deposits alleged in the indictment were made between April 12 and July 13, 1982 and thus, the government was barred from prosecuting Aspromonti for these acts. At best, Aspromonti arguably caused the failure of reporting a fraction of the deposits listed in the indictment.

A direct result of counsel's failure to assert the statute of limitations evidence was the improper admission of regarding unindictable conduct, resulting in ac-

tual and irreparable prejudice to Aspromonti in the eyes of the jury, which was improperly permitted to hear testimony regarding millions of dollars of cash deposits indisputably made beyond the prosecutable period.

Applying Strickland, it is clear that trial counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms and that the prejudice caused to Aspromonti was overwhelming; but for the inadequate representation and unprofessional conduct of counsel, there is a strong likelihood Aspromonti would have been acquitted of some, if not all, of the charges brought against him,

and that, even if convicted, his sentence would not have been as severe.

The District Court, though ignoring Strickland, did discuss this ineffective counsel argument at length, stating it "ignores the nature of the substantive crimes of which [Aspromonti] was convicted," and found that 31 U.S.C. §5322(b) "makes a continuing course of conduct illegal, and the statute of limitations does not bar proof of such a course of conduct if any part of it falls within the statutory period" [A-7-8], citing the RICO conspiracy cases of United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989), and United States v. Persico,

832 F.2d 705 (2d Cir. 1987), cert. denied, __ U.S. ___, 108 S. Ct. 1995 (1988).

Neither Persico nor Rastelli are support for this application of the statute of limitations. The RICO conspiracy statute does not require proof of an overt act, and, therefore, a RICO conspiracy is not complete until the purposes of the conspiracy are accomplished or abandoned. See, Persico at 713.

Aspromonti, however, was prosecuted and convicted of violating 18 U.S.C. §371, which does require "proof of an overt act," and approximately 60% of the "overt acts" testified to at trial occurred beyond the statute of limitations period and should

never have been heard by the jury.[17] It is thus an erroneous application of the statute of limitations which this Court should not allow to stand.

Trial counsel also failed to object to the inadmissible hearsay testimony of co-conspirator Iorizzo. See, Fed. R. Evid. 801(d)(2)(E) (co-conspirator's statements admissible only if statements found to be

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17 As Persico was decided less than two (2) months prior to Aspromonti's trial and was then the subject of a certiorari petition which was not denied until May 23, 1988 [see ___ U.S. ___, 108 S. Ct. 1995 (1988)], there was simply no possible warrant for Aspromonti's trial counsel's rank failure to raise and preserve this issue and object to the testimony of "overt acts".

"sufficiently reliable in light of independent corroborating evidence").

With regard to Iorizzo, there was no (or certainly grossly inadequate) independent corroborating evidence of the conspiracy as is required. See, United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). It is thus clear that the hearsay testimony of co-conspirator Iorizzo was erroneously admitted against Aspromonti. See, Bourjaily v. United States, 483 U.S. 171 (1987).

Aspromonti's trial counsel failed to object to such testimony, nor did he even request a cautionary instruction to the effect that the government would be required

to show independent evidence of the existence of a conspiracy, and that Aspromonti was a member of that conspiracy, in order for such testimony to be admissible. This failure unquestionably fits squarely within Strickland test.[18]

Aspromonti's trial counsel also failed to object to Iorizzo's testimony which contained impermissible references -- all in

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18 The conduct of trial counsel in failing to object to the admission of the aforementioned testimony not only fell below objective standards of reasonableness, see, Strickland, supra, but indisputably cost Aspromonti the right to the claim on appeal as the objection was deemed waived: the Circuit Court expressly held in the criminal appeal that it would not review the issue in light of the trial counsel's silence.

violation of Fed. R. Evid. 404(b) -- to (i) other conspiracies, (ii) money deposits in Austrian Bank accounts, and (iii) transportation of weapons, which not only allowed this testimony into evidence, but waived objection to same on appeal. In applying Strickland, trial counsel's failure to object to the "other crimes" evidence presented at trial clearly fell below an objective standard of reasonableness under prevailing professional norms. The information elicited from Iorizzo was so prejudicial to Aspromonti that to postulate that trial counsel had any sort of reasonable trial strategy in mind when he decided not to object to the "other crimes" testimony

is ludicrous especially as Iorizzo's testimony was the only evidence actually linking Aspromonti to the conspiracy.

There was no issue of motive, knowledge or intent in the instant case. The only position Aspromonti took at trial was that he committed no wrong. Under such circumstances, Rule 404(b) evidence may not be admitted. United States v. Benedetto, 570 F.2d 1246, 1249 (2d Cir. 1978). Admitting evidence of other crimes merely because they are related but occurring in different times, places and with different people "presents the precise threat of prejudice that Rule 404(b) was designed to eliminate." See,

United States v. Levy, 731 F.2d 997, 1004 (2d Cir. 1984).

The extent to which the "other crimes" evidence was admitted, was heard by the jury, and trial counsel passively acquiesced in the destruction of his client before the eyes of the jury, was so great that it is reasonable to conclude that but for counsel's unprofessional conduct in failing to object to the testimony, the result of the

trial would have been different.[19] See, Strickland, supra.

Trial counsel's consistently ineffective assistance was once again evidenced by his failure to request that the Court charge the "retail type" business exemption of 31

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19 Furthermore, to make matters worse, not only did Aspromonti's trial counsel passively waive Aspromonti's claims for appeal by failing to object to the aforementioned, but he bizarrely and incompetently compounded these errors by actively eliciting substantial portions of "other crimes" testimony including schemes relating to New York's gasoline tax law on his cross-examination.

C.F.R. §103.22(b)(2)(i),[20] allowing the Court to simply charge that Extebank had a general duty to file CTRs. Accordingly, the jury was not properly charged that if it found Galion and/or DEM were "retail-type" businesses, Extebank was exempt from filing CTRs for their deposits and Aspromonti could not, of necessity, be found guilty for those related counts.

Moreover, the district court charged that "the parties have stipulated that Exte-

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20 Not only did trial counsel fail to request the proper charge, but he likewise failed to object to the charge as given, on the ground that 31 C.F.R. §103.22(b)(2)(i) should have been charged.

bank is a financial institution that was required to file Currency Transaction Reports pursuant to Title 31 of United States Codes", which simply is not the case. The parties stipulated only that "Extebank is a financial institution within the meaning of the statute," i.e., 31 U.S.C. § 5312(a)(2), which defines the term "financial institution" and which is silent as to requirements to file CTR's.[21]

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21 This misstatement of the Stipulation was particularly damaging in light of the statement in the charge that "[w]hen the attorneys on both sides stipulate -- that is agree -- to the existence of a fact, the jury must accept the Stipulation and consider the fact as proven."

As the issue of whether Galion and/or DEM were (or could be) properly exempted from the CTR reporting requirements goes to the very crux of Aspromonti's conviction, the failure of Aspromonti's trial counsel to request the proper charge and/or to object to the charge given [i.e., in this context, to object to the Court's critical misstatement of the partial Stipulation] plainly fell below the objective standard of reasonableness of representation and severely prejudiced Aspromonti in obtaining a favorable verdict. See, Strickland, supra.

Trial counsel also failed to object to the trial court's erroneous charge to the

jury that Extebank was found "guilty" without informing the jury of what crime Extebank was found guilty of committing. counsel either did not know which subsection of §5322 Extebank plead guilty to violating or he inexplicably failed to object to the trial court's charge. In either event, pursuant to the Strickland standard, Aspromonti's representation was clearly insufficient resulting in severe prejudice to him.

Aspromonti was also the victim of the ineffective assistance of appellate counsel, who on direct appeal either was unaware of or otherwise inexplicably did not raise either (i) the plain errors in the Court's

charge or (ii) the plainly ineffective assistance of trial counsel, and (iii) the "ex post facto" criminalization of Aspromonti's conduct by the 1986 enactment of §5324, which was not even cited in the appellate brief.

Applying the Strickland test, it is clear that the conduct of Aspromonti's appellate counsel also fell below an objective standard of reasonableness, since these extremely meritorious issues should have been fully briefed and argued for Court of Appeals consideration on the criminal appeal (especially in light of appellate counsel's acknowledgment that trial counsel had failed to preserve the record in certain

critical respects). Had appellate counsel made these important arguments, Aspromonti's conviction was much more likely to have been overturned on direct appeal. Indeed, it unfortunately appears that appellate counsel was more interested in protecting trial counsel than protecting Aspromonti: appellate counsel did not categorize the admission of the testimony in violation of Fed. R. Evid. 801(d)(2)(E) and 404(B) as "plain error" affecting the substantial rights of Aspromonti until his Reply Brief in responding to issues raised by the Government, and even then inexplicably defended trial counsel's error, dooming Aspromonti's direct appeal.

Totally ignoring the incompetence test of Strickland, supra, the district court deemed Aspromonti's appellate counsel competent after an examination of their briefs found them to be "forceful, articulate and coherent." [A-8] Such reasoning is totally contrary to the relevant case law, yet the Second Circuit erroneously affirmed, again summarily characterizing Aspromonti's argument as "without merit." [A-3]

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the Memorandum and Order and the Judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Zane and Rudofsky
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Vincent Aspromonti
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(212) 245-2222

Edward S. Rudofsky,
Douglas M. Lieberman,

Of Counsel.

ORDER OF THE COURT OF APPEALS DATED DECEMBER 18th, 1989 AND ENTERED THEREON DECEMBER 18, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of December, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE ROGER J. MINER,

Circuit Judges.

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VINCENT ASPROMONTI,

Plaintiff-Appellant, ORDER

- v - 89-2331

UNITED STATES OF AMERICA,

Defendant-Appellee.

----------X

Appeal from a judgment of the United States District Court for the Eastern District of New York, Nickerson, J., denying Vincent Aspromonti's motion pursuant to 28 U.S.C. §2255 to vacate, set aside, or correct his sentence.

Aspromonti was convicted for violations of the Bank Secrecy Act, 31 U.S.C. §§5313(a), 5322(b), and for conspiracy, 18 U.S.C. §371, to violate the Bank Secrecy Act, and to defraud the United States, id, §§1001, 2. On June 2, 1988, his judgment of conviction was affirmed on appeal.

In April 1989 Aspromonti filed a motion in the district court to vacate, set

aside, or correct his sentence, which motion was denied by order dated June 2, 1989.

On appeal Aspromonti challenges his convictions pursuant to 18 U.S.C. §2(b) for willfully causing a financial institution to fail to file Currency Transaction Reports in violation of 31 U.S.C. §§5313 and 5322. He argues that Congress' enactment in 1986 of 31 U.S.C. §5324, which expressly prohibits the acts for which he was convicted, evidences that Congress never intended for §§5313 and 5322 to prohibit his conduct, which occurred primarily in 1982. This argument is without merit.

A close reading of the legislative history of §5324 shows that Congress was

aware of the split between the circuits as to whether individuals who willfully cause a financial institution to fail to file a financial report could be liable under the Bank Secrecy Act. See H.R. Rep. No. 746, 99th Cong., 2d Sess. 19 (1986). However, Congress voiced no opinion as to the correctness of this circuit's position on the issue, nor do we think that any such inference can be drawn from the fact that Congress found it necessary to clarify the Bank Secrecy Act through the enactment of §5324. Consequently, we adhere to our earlier decisions that an individual may be liable pursuant to 18 U.S.C. §2(b) for causing a financial institution to fail to file Currency Transaction Reports. United States v. Nersesian, 824 F.2d 1294 (2d

Cir.), cert. denied, 484 U.S. 957 (1987); United States v. Heyman, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986).

Aspromonti also argues that: 1) he was denied due process because §§5313 and 5322 are unconstitutionally vague and provide insufficient notice; 2) he was denied effective assistance of trial counsel and appellate counsel; and 3) the jury charge was constitutionally defective. We have considered these arguments and find them to be without merit.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

s/ Ellsworth A. Van Graafeiland
HON. ELLSWORTH A. VAN GRAAFEILAND

s/ Lawrence W. Pierce
HONORABLE LAWRENCE W. PIERCE

s/ Roger J. Miner
HONORABLE ROGER J. MINER

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

MEMORANDUM AND ORDER OF THE
DISTRICT COURT DATED JUNE 2, 1989
AND ENTERED THEREON JUNE 7, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

87 CR 455
89 C 1346

VINCENT ASPROMONTI,

MEMORANDUM
AND ORDER

Defendant-Petitioner.

----------X

ANDREW J. MALONEY,
United States Attorney
EDWARD A. McDONALD,
Attorney-in-Charge
Organized Crime Strike Force
(Laura A. Brevetti, Assistant
Attorney-in-Charge, of counsel)
Brooklyn, New York

ZANE and RUDOFSKY
(James B. Zane, Esq., Edward S.
Rudofsky, Esq., and Karen M. Newman,
Esq., of counsel)

New York, New York
for defendant

NICKERSON, District Judge

Defendant-petitioner moves to vacate his sentence. After a jury trial he was convicted before this court of one count of conspiracy to defraud the United States and to commit other offenses, 18 U.S.C. §371 (1982), and of three counts of violating the Currency Transaction Report Act, 31 U.S.C. §§5313 and 5322(b) (1982).

The court sentenced petitioner to a total of ten years imprisonment, a fine of $500,000, and an assessment of $200. In an unpublished opinion the Court of Appeals affirmed the conviction.

Petitioner asks the court to vacate the sentence on the grounds that (a) 31

U.S.C. §§5313 and 5322(b) did not make criminal the acts petitioner committed, (b) those sections were unconstitutionally vague, (c) both his trial and his appellate counsel were constitutionally ineffective, and (d) the charge to the jury denied petitioner due process. The court finds no merit in any of petitioner's arguments.

1. The Court of Appeals for the Second Circuit has already rejected the first two contentions in the opinions in this case and in United States v. Nersesian, 824 F.2d 1294 (2d Cir.), cert. denied, 108 S. Ct. 355 (1987), and United States v. Heyman, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986). The argument that subsequent legislation, which was in effect when the Court of Appeals

decided the appeal in this case, would somehow cause the Circuit Court to change its opinion, is, to put it charitably, frivolous.

2. This court did not deem petitioner's trial counsel, John L. Buonora, incompetent. Indeed, he made a sincere and appealing impression before the jury. Petitioner now claims his counsel was ineffective because he failed to make various objections.

Only one point is worthy of discussion. Trial counsel did not object to proof of some bank deposits made more than five years prior to the time the statute of limitations began to run.

Petitioner's argument ignores the nature of the substantive crimes of

which he was convicted. Section 5322(b) provides, in pertinent part, that a person "willfully violating this subchapter . . . as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period" is guilty of a crime. The statute thus makes a continuing course of conduct illegal, and the statute of limitations does not bar proof of such a course of conduct if any part of it falls within the statutory period. Cf. United States v. Rastelli, 870 F.2d 822, (2d Cir. 1989), ___ Lexis ___, 3-16-89; United States v. Persico, 832 F.2d 705, 713-14 (2d Cir. 1987), cert. denied, 108 S. Ct. 1995 (1988). Many of the deposits were made before the limitation period ran.

In any event all of the deposits were admissible as proof of the conspiracy count alleging a conspiracy continuing from April 1, 1982 through December 31, 1985. There was thus no significant prejudice to petitioner.

3. This court has examined the briefs filed by petitioner's appellate counsel, Slater, Vanderpool & Breakstone, and does not deem them incompetent. They are forceful, articulate and coherent. Appellate counsel was not incompetent for failing to charge trial counsel with incompetence.

Motion denied. So ordered.

Dated: Brooklyn, New York
June 2, 1989

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

JUDGMENT OF THE DISTRICT COURT
DATED JUNE 8, 1989 AND ENTERED
THEREON JUNE 9, 1989

UNITED STATES DISTRICT COURT
EASTRN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

VINCENT ASPROMONTI,

Defendant-Petitioner,

----------X

JUDGMENT

CV 89-1346
(EHN)

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on June 7, 1989 denying petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255, it is

ORDERED and ADJUDGED that petitioner take nothing of respondent; and that petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255 is denied.

Dated: Brooklyn, New York
June 8, 1989

s/Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of the Court

Section 9, Clause 3. Bills of Attainder and Ex Post Facto Law

No Bill of Attainder or ex post facto Law shall be passed.

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more that five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more that $10,000 or imprisoned not more than five years, or both.

§3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any

offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

§2255. Federal Custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the

sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights

of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

§5311. Declaration of purpose

It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal,

tax, or regulatory investigations or proceedings.

§5312. Definitions and application

(a) In this subchapter-

(2) "financial institution" means-

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money;

(S) a telegraph company;

(T) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this clause (2); or

(U) another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury prescribes.

§5313. Reports on domestic coins and currency transactions.

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other

monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the

Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this title or a regulation prescribed under section 5315), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to

file a report under this section shall file the report-

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe -

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully viclating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title or regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

§5324. Structuring transactions to evade reporting requirement prohibited.

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction-

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

§103.22 Reports of Currency Transactions.

(a)(1) Each financial institution other than a casino or the postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which

involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

(2) Each casino shall file a report of each deposit, withdrawal, exchange of currency, gambling tokens or chips, or other payment or transfer, by, through, or to such casino which involves a transaction in currency of more than $10,000. Multiple currency transactions

shall be treated as a single transaction if the casino has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any twenty-four hour period.

(3) The Postal Service shall file a report of each cash purchase of postal money orders in excess of $10,000. Multiple cash purchases totaling more than $10,000 shall be treated as a single transaction if the Postal Service has knowledge that they are by or on behalf of any person during any one day.

(4) A financial institution includes all of its domestic branch offices for the purpose of this paragraph's reporting requirements.

(b) Except as otherwise directed in writing by the Assistant Secretary (Enforcement) or the Commissioner of Internal Revenue:

(1) This section shall not require reports:

(i) Of transactions with Federal Reserve Banks or Federal Home Loan banks;

(ii) Of transactions between domestic banks; or

(iii) By nonbank financial institutions of transactions with commercial banks (however commercial banks must report such transactions with nonbank financial institutions).

(2) A bank may exempt from the reporting requirement of paragraph (a) of this section the following:

(i) Deposits or withdrawals of currency from an existing account by an established depositor who is a United States resident and operates a retail type of business in the United States. For the purpose of this subsection, a retail type of business is a business primarily engaged in providing goods to ultimate consumers and for which the business is paid in substantial portions by currency, except that dealerships which buy or sell motor vehicles, vessels, or aircraft are not included and their transactions may not be

exempted from the reporting requirements of this section.

(ii) Deposits or withdrawals of currency from an existing account by an established depositor who is a United States resident and operates a sports arena, race track, amusement park, bar, restaurant, hotel, check cashing service licensed by state or local governments, vending machine company, theater, regularly scheduled passenger carrier or any public utility.

(iii) Deposits or withdrawals, exchanges of currency or other payments and transfers by local or state governments, or the United States or any of its agencies or instrumentalities.

(iv) Withdrawals for payroll purposes from an existing account by an established depositor who is a United States resident and operates a firm that regularly withdraws more than $10,000 in order to pay its employees in currency.

(c) In each instance the transactions exempted under paragraph (b) of this section must be in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the lawful, domestic business of that customer, or in the case of transactions with a local or state government or the United States or any of its agencies or instrumentalities, in amounts which are customary and commensurate with the authorized activities

of the agency or instrumentality. This section does not permit a bank to exempt its transactions with nonbank financial institutions (except for check cashing services licensed by state or local governments and the United States Postal Service) nor will additional exemption authority be granted for such transaction (except transactions by other check cashers).

(d) After October 27, 1986, a bank may not place any customer on its exempt list without first preparing a written statement, signed by the customer, describing the customary conduct of the lawful domestic business of that customer and a detailed statement of reasons why such person is qualified for an exemption.

The statement shall include the name, address, nature of business, taxpayer identification number, and account number of the customer being exempted. The signature, including the title and position of the person signing, will attest to the accuracy of the information concerning the name, address, nature of business, and tax identification number of the customer. Immediately above the signature line, the following statement shall appear: "The information contained above is true and correct to the best of my knowledge and belief. I understand that this information will be read and relied upon by the Government." The bank shall indicate in this statement whether the exemption covers withdrawals, deposits, or both, as well as

the dollar limit of the exemption for both deposits and withdrawals. The bank also shall indicate whether the exemption is limited to certain types of deposits and withdrawals (e.g., withdrawals for payroll purposes). In each instance, the exempted transactions must be in amounts that the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the lawful domestic business of that customer. The bank is responsible for independently verifying the activity of the account and determining applicable dollar limits for exempted deposits or withdrawals. The bank must retain each statement that it prepares pursuant to this subparagraph as long as the customer is on the exempt list, and for a period of five years following

removal of the customer from the bank's exempt list.

(e) A bank may apply to the Commissioner of Internal Revenue for additional authority to grant an exemption to the reporting requirement, not otherwise permitted under paragraph (b) of this section, if the bank believes that circumstances warrant such an exemption. Such requests shall be addressed to: Chief, Currency and Banking Reports Branch, Compliance Review Group, IRS Data Center, Post Office Box 32063, Detroit, Michigan 48232, and must be accompanied by a statement of the circumstances that warrant special exemption treatment and a copy of the statement signed by the customer required by paragraph (d) of this section.

(f) A record of each exemption granted under this section and the reason therefor must be kept in a centralized list. The record shall include the names and addresses of all banks referred to in paragraph (b)(1)(ii) of this section, as well as the name, address, business, taxpayer identification number and account number of each depositor that has engaged in currency transactions which have not been reported because of the exemption provided in paragraph (b)(2) of this section. The record concerning the group of depositors exempted under the provisions of paragraph (b)(2) of this section shall also indicate whether the exemption covers withdrawals, deposits, or both, as well as the dollar limit of the exemption.

(g) Upon the request of the Assistant Secretary (Enforcement) or the Commissioner of Internal Revenue, a bank shall provide a report containing the list of the bank's customers whose transactions have been exempted under this section and such related information as the Assistant Secretary or Commissioner shall require, including copies of the statements required in paragraph (d) of this section. The report must be provided within 15 days of the request. Any exemption may be rescinded at the discretion of the requesting official, who may require the bank to file reports required by paragraph (a) of this section with respect to future transactions of any customer whose transactions previously were exempted.

§103.25 Reports of transactions with foreign financial agencies.

(a) Promulgation of reporting requirements. The Secretary, when he deems appropriate, may promulgate regulations requiring specified financial institutions to file reports of certain transactions with designated foreign financial agencies. If any such regulation is issued as a final rule without notice and opportunity for public comment, then a finding of good cause for dispensing with notice and comment in accordance with 5 U.S.C. 553(b) will be included in the regulation. If any such regulation is not published in the FEDERAL REGISTER, then any financial institution subject to the regulation will be named and personally served or otherwise

given actual notice in accordance with 5 U.S.C. 553(b). If a financial institution is given notice of a reporting requirement under this section by means other than publication in the FEDERAL REGISTER, the Secretary may prohibit disclosure of the existence or provisions of that reporting requirement to the designated foreign financial agency or agencies and to any other party.

(b) Information subject to reporting requirements. A regulation promulgated pursuant to paragraph (a) of this section shall designate one or more of the following categories of information to be reported:

(1) Checks or drafts, including traveler's checks, received by

foreign financial agency, sent by respondent financial institution to a foreign country for collection or payment, drawn by respondent financial institution on a foreign financial agency, drawn by a foreign financial agency on respondent financial institution - including the following information.

(i) Name of maker or drawer;

(ii) Name of drawee or drawee financial institution;

(iii) Name of payee;

(iv) Date and amount of instrument;

(v) Names of all endorsers.

(2) Wire or electronic fund transfers received by respondent financial institution from a foreign financial agency or sent by respondent financial institution to a foreign financial agency - including the following information:

(i) Name of foreign financial agency;

(ii) Name, address and account number of account being credited or debited by respondent financial institution;

(iii) Name of respondent financial institution;

(iv) Date and amount of each transfer;

(v) Any other information normally appearing on respondent financial

institution's internal wire or electronic fund transfer entries.

(3) Loans made by respondent financial institution to or through a foreign financial agency - including the following information:

(i) Name of borrower;

(ii) Name of person acting for borrower;

(iii) Date and amount of loan;

(iv) Terms of repayment;

(v) Name of guarantor;

(vi) Rate of interest;

(vii) Method of disbursing proceeds;

(viii) Collateral for loan.

(4) Commercial paper received or shipped by the respondent financial institution - including the following information:

(i) Name of maker;

(ii) Date and amount of paper;

(iii) Due date;

(iv) Certificate number;

(v) Amount of transaction;

(5) Stocks received or shipped by respondent financial institution - including the following information:

(i) Name of corporation;

(ii) Type of stock;

(iii) Certificate number;

(iv) Number of shares;

(v) Date of certificate;

(vi) Name of registered holder;

(vii) Amount of transaction.

(6) Bonds received or shipped by respondent financial institution - including the following information:

(i) Name of issuer;

(ii) Bond number;

(iii) Type of bond series;

(iv) Date issued;

(v) Due date;

(vi) Rate of interest;

(vii) Amount of transaction;

(viii) Name of registered holder.

(7) Certificates of deposit received or shipped by respondent financial

institution - including the following information:

(i) Name and address of issuer;

(ii) Date issued;

(iii) Dollar amount;

(iv) Name of registered holder;

(v) Due date;

(vi) Rate of interest;

(vii) Certificate number;

(viii) Name and address of issuing agent.

(c) Scope of reports. In issuing regulations as provided in paragraph (a) of this section, the Secretary will prescribe:

(1) A reasonable classification of financial institutions subject to or exempt from a reporting requirement;

(2) A foreign country to which a reporting requirement applies if the Secretary decides that applying the requirement to all foreign countries is unnecessary or undesirable;

(3) The magnitude of transactions subject to a reporting requirement; and

(4) The kind of transaction subject to or exempt from a reporting requirement.

(d) Form of reports. Regulations issued pursuant to paragraph (a) of this section may prescribe the

manner in which the information is to be reported. However, the Secretary may authorize a designated financial institution to report in a different manner if the institution demonstrates to the Secretary that the form of the required report is unnecessarily burdensome on the institution asd prescribed; that a report in a different form will provide all the information the Secretary deems necessary; and that submission of the information in a different manner will not unduly hinder the effective administration of this part.

(e) Limitations. (1) In issuing regulations under paragraph (a) of this section, the Secretary shall consider the need to avoid impeding or controlling the export or import of monetary

instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency.

(2) The Secretary shall not issue a regulation under paragraph (a) of this section for the purpose of obtaining individually identifiable account information concerning a customer, as defined by the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.), where that customer is already the subject of an ongoing investigation for possible violation of the Currency and Foreign Transactions Reporting Act, or is known by the Secretary to be the subject of an investigation for possible violation of any other Federal law.

(3) The Secretary may issue a regulation pursuant to paragraph (a) of this section requiring a financial institution to report transactions completed prior to the date it received notice of the reporting requirement. However, with respect to completed transactions, a financial institution may be required to provide information only from records required to be maintained pursuant to pursuant to Subpart C of this part, or any other provision of state or Federal law, or otherwise maintained in the regular course of business.

§103.26 Filing of reports.

(a)(1) A report required by §103.22(a) shall be filed by the financial

institution within 15 days following the day on which the reportable transaction occurred.

(2) A report required by §103.22(g) shall be filed by the bank within 15 days after receiving a request for the report.

(3) A copy of each report filed pursuant to §103.22 shall be retained by the financial institution for a period of five years from the date of the report.

(4) All reports required to be filed by §103.22 shall be filed with the Commissioner of Internal Revenue, unless otherwise specified.

(b)(1) A report required by §103.23(a) shall be filed at the time of entry into the United States or at the time

of departure, mailing or shipping from the United States, unless otherwise specified by the Commissioner of Customs.

(2) A report required by §103.23(b) shall be filed within 15 days after receipt of the currency or other monetary instruments.

(3) All reports required by §103.23 shall be filed with the Customs officer in charge at any port of entry or departure, or as otherwise specified by the Commissioner of Customs. Reports required by §103.23(a) for currency or other monetary instruments not physically accompanying a person entering or departing from the United States, may be filed by mail on or before the date of entry, departure, mailing or shipping. All

reports required by §103.23(b) may also be filed by mail. Reports filed by mail shall be addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20229.

(c) Reports required to be filed by §103.24 shall be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year.

(d) Reports required by §103.22, §103.23 or §103.24 shall be filed on forms prescribed by the Secretary. All information called for in such forms shall be furnished.

(e) Forms to be used in making the reports required by §§103.22 and 103.24 may be obtained from the Internal Revenue Service. Forms to be used in making the reports required by §103.23 may be obtained from the U.S. Customs Service.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 801. Definitions

The following definitions apply under this article

* * *

(d) Statements which are not hearsay. A statement is not hearsay if -

* * *

(2) admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief

in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

No. 89-1567

In the Supreme Court of the United States

OCTOBER TERM, 1989

VINCENT ASPROMONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit a customer from causing a financial institution to fail to file Currency Transaction Reports.

2. Whether petitioner was denied the effective assistance of counsel.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported. The opinion of the district court (Pet. App. A7-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1989. The petition for a writ of certiorari was filed on March 19, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was con-

victed on one count of conspiracy to cause a financial institution to fail to file Currency Transaction Reports (CTRs) and to make false statements in a government matter, in violation of 18 U.S.C. 371; and on three substantive counts of causing a financial institution to fail to file CTRs, in violation of 31 U.S.C. 5313 and 5322(b) (1982) (formerly 31 U.S.C. 1081 and 1059(2) (1976)). He was sentenced to a total of ten years' imprisonment and was ordered to pay a $500,000 fine. The court of appeals affirmed petitioner's convictions in an unpublished opinion, and petitioner did not seek further review at that time. He thereafter moved to vacate his sentence, pursuant to 28 U.S.C. 2255. The trial court denied that motion (Pet. App. A7-A12), and the court of appeals affirmed (Pet. App. A1-A6).

1. The evidence at trial, which is not in dispute, showed that between April 12, 1982, and September 30, 1982, petitioner and his confederates arranged to deposit $10 million into an account at Extebank, in Hauppauge, New York. Of that amount, approximately $7.6 million was deposited in cash, including 34 separate deposits in excess of $100,000. With the assistance of petitioner's co-defendant, George Ruggiero, then the assistant vice-president and branch manager of the bank, no CTRs were filed on any of the cash transactions. Gov't C.A. Br. 15-16.[1]

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[1] Under federal law, a financial institution is required to file a CTR whenever a customer makes a currency payment in excess of $10,000. 31 U.S.C. 5313 (1982) (formerly 31 U.S.C. 1081, 1082, 1083) (1976); 31 C.F.R. 103.22(a) (1982).

Section 5313(a) (31 U.S.C.) (1982) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the trans-

On direct appeal, the court of appeals affirmed petitioner's convictions – rejecting, in particular, his claim that an individual bank customer may not be held liable for causing a bank to fail to file CTRs. C.A. App. 607. Petitioner did not file a petition for a writ of certiorari from that judgment. On April 26, 1989, after retaining new counsel, petitioner filed a motion in the United States District Court for the Eastern District of New York to vacate his sentence pursuant to 28 U.S.C. 2255.

The district court denied the motion. Pet. App. A7-A12. The court noted first that under Second Circuit precedent petitioner was properly held liable for causing a bank to fail to file CTRs. *Id.* at A9. It also rejected the contention that certain amendments to the CTR provisions, enacted in 1986, cast doubt on the applicability of the provisions at the time of petitioner's offenses. *Id.* at A9-A10. Finally, the district court held that petitioner's trial and appellate counsel had not rendered ineffective assistance to him. The court found that trial counsel had not erred in failing to object to the admission of bank deposits made more than five years prior to indictment, in view of the fact that those

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action the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. * * *

Section 103.22(a) (31 C.F.R.) (1982) provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contains the following provision (Treasury Form 4789 (1980)):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

deposits were part of a "continuing course of conduct." *Id.* at A11. The court also stated that petitioner's appellate counsel had submitted briefs on his behalf that were "forceful, articulate and coherent." *Id.* at A12.

2. The court of appeals affirmed in an unpublished order. Pet. App. A1-A6. The court refused to draw any inference "from the fact that Congress found it necessary to clarify the Bank Secrecy Act" in 1986. *Id.* at A4. The court stated that it would therefore "adhere to [its] earlier decisions that an individual may be liable pursuant to 18 U.S.C. § 2(b) for causing a financial institution to fail to file Currency Transaction Reports." *Ibid.* The court also held that petitioner had not been denied the effective assistance of trial and appellate counsel. *Id.* at A5.

ARGUMENT

1. Petitioner contends (Pet. 34-42) that this Court should review the government's theory that it is illegal to cause a financial institution to fail to file CTRs. The same claim has been before the Court in several recent cases, and in each case the Court has denied certiorari. See *Bruno* v. *United States*, 110 S. Ct. 721 (1990); *Meros* v. *United States*, 110 S. Ct. 322 (1989); *Lafaurie* v. *United States*, 486 U.S. 1032 (1988); *Perlmutter* v. *United States*, 485 U.S. 935 (1988); *Florez* v. *United States*, 484 U.S. 1060 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[2] Congress, however,

[2] We have furnished counsel with a copy of our brief in opposition in the *Bruno* case, in which we restated the arguments that we had previously made in the *Meros*, *Lafaurie*, *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 486 U.S. 1032 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 508 (9th Cir.

1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324 (Supp. V 1987)), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Com-

mittee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause

> a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001 (concealing from the government a material fact by a trick, scheme, or device). [3]
>
> In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements. [4]
>
> The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various cir-

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[3] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. No. 746, *supra*, at 18 n.1).

[4] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel* (H.R. Rep. No. 746, *supra*, at 19 n.2).

> cuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation, there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

The court below did not address in detail the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986). In *Heyman*, the court of appeals had held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[5] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United

---

[5] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[6]

Those principles apply here as well. A bank customer's success in preventing the bank from filing CTRs cannot shield him from liability under Section 2(b). Petitioner was lawfully convicted on that basis.

Petitioner contends (Pet. 24-34), however, that by enacting the 1986 amendments to the CTR provisions – which, petitioner admits (Pet. 24-25), squarely apply to his conduct – Congress effectively acknowledged that the CTR

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[6] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger, by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows." 300 U.S. at 48-49. So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

provisions, as unamended, did not cover petitioner's conduct in 1982. That contention is meritless. As the court of appeals observed, when Congress enacted the 1986 amendments it "voiced no opinion as to the correctness of the [Second] [C]ircuit's position on the issue." Pet. App. A4. When it acts to resolve a conflict among the circuits, Congress cannot be assumed to have concluded that the position it rejects was the correct reading of prior law; as in this case, Congress may have acted simply to correct confusion among the circuits, even if it regards the amended statute as consistent with the proper interpretation of the prior law. Thus, no inference can be drawn "from the fact that Congress found it necessary to clarify the Bank Secrecy Act through the enactment of § 5324." *Ibid.*

2. Petitioner contends (Pet. 43-64) that his trial and appellate attorneys deprived him of the effective assistance of counsel. Both the district court and the court of appeals examined that claim and rejected it as meritless. Indeed, the district court, which tried the case originally, found that petitioner's defense counsel had made "a sincere and appealing impression before the jury." Pet. App. A10. In addition, the district court explained that it had "examined the briefs filed by petitioner's appellate counsel" and did "not deem them incompetent." *Id.* at A12. To the contrary, the district court observed, the briefs were "forceful, articulate and coherent." *Ibid.* The court of appeals reached the same conclusion. *Id.* at A5. Petitioner's factbound challenge to those conclusions warrants no further review.[7]

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[7] In any event, petitioner's claims of incompetent counsel are meritless. For example, he contends (Pet. 46-48) that his trial counsel mistakenly failed to object to evidence of bank deposits made more than five years before petitioner was indicted. But as the trial court noted (Pet. App. A10-A11), petitioner was charged with causing a failure to file CTRs "as part of a pattern of illegal activity involving currency transactions." C.A. App. 597. "The statute thus makes a con-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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tinuing course of conduct illegal, and the statute of limitations does not bar proof of such a course of conduct if any part of it falls within the statutory period." Pet. App. A11. Moreover, petitioner was charged with conspiracy, and the government was therefore entitled to prove overt acts outside the statute of limitations, provided that at least one overt act fell within the statutory period. Petitioner also contends (Pet. 51-57) that his trial counsel failed to object to certain testimony of one of the government's witnesses. He does not, however, explain why, had the testimony been precluded, "the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). And because none of petitioner's legal contentions is meritorious, there is likewise no merit to his contention (Pet. 61-64) that appellate counsel erred in failing to challenge the effectiveness of petitioner's trial attorney.

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